STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HYLKE FABER	:	SMALL CLAIMS DETERMINATION DTA NO. 820252
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 2000, 2001, and 2002.	:	:

Petitioner, Hylke Faber, 373 Bleeker Street, Apt. # 4A, New York, New York 10014, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2000, 2001, and 2002.

A small claims hearing was held before Timothy J. Alston, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 15, 2005 at 10:30 A.M., which date began the three-month period for the issuance of this determination. Petitioner appeared by Carl E. Stoops, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Susan Parker).

ISSUE

Whether petitioner maintained a permanent place of abode in New York State and New York City for the years 2000, 2001 and 2002 within the meaning of Tax Law § 605(b)(1)(B) and Administrative Code of the City of New York § 1305(b).

FINDINGS OF FACT

1. Petitioner, Hylke Faber, is a citizen of the Netherlands.

2. Petitioner has maintained a residence in New York City since 1995. He filed New York nonresident returns beginning with the tax year 1995 and continuing through the years at issue.

3. In 1999, petitioner commenced employment with Strategic Decisions Group ("SDG"), a subsidiary of Navigant Consulting, Inc. SDG is an international management consulting company headquartered in Menlo Park, California, with offices in New York, Boston, Houston, and London, U.K., and joint ventures with organizations in India and Japan.

4. Petitioner was hired as an associate with SDG. His employment agreement, dated January 23, 1999, specifically provides that his employment was "for no specified period and may be terminated by you or SDG at any time with or without cause or with or without notice."

5. Petitioner was authorized to work for SDG in the United States pursuant to an H-1B visa issued August 9, 1999 and expiring March 1, 2002.

6. Petitioner's H-1B status was extended to July 31, 2002 pursuant to a Notice of Action of the United States Department of Justice, Immigration and Naturalization Service.

7. As of July 31, 2002, petitioner applied to the Immigration Service for an adjustment of status to permanent resident. He was allowed to continue to legally reside and work in the United States so long as such application was pending. Petitioner's application for permanent resident status was subsequently granted. Petitioner continued to reside in New York City and continued to work for SDG in 2003 and 2004. He filed resident New York income tax returns for those years.

8. On or about August 4, 2003, the Division of Taxation ("Division") mailed a letter advising petitioner that his New York State tax returns for the years 2000, 2001, and 2002 were under review. The letter asked petitioner to supply a statement detailing his work assignment with Navigant Consulting, Inc. and SDG, a copy of his employment agreement with Navigant Consulting, Inc. and SDG, and a statement regarding his visa status along with a copy of his visa. The Division explained that it needed the information in order to establish that petitioner's residence in New York was temporary, for a fixed and limited period of time and for the accomplishment of a particular purpose.

9. In response, petitioner provided, among other things, a letter dated August 20, 2003 from Laurie Mandel, Corporate Secretary, SDG, which contained the following statement regarding petitioner's employment with SDG in 2000, 2001, and 2002:

> SDG hired Mr. Faber in the New York office, to be transferred to the London UK office in 2002 upon completion of his assignment and training in New York. From London UK, Mr. Faber would further expand SDG's European operations. Mr. Faber worked from the New York office to receive training (to tailor his consulting skills to SDG-specific methodologies) and to complete a set of seven portfolio and strategy assignments for SDG's US, European, and Japanese clients. To complete this set of assignments during 2000, 2001, and 2002, Mr. Faber spent a large part of this period working in Germany, The Netherlands, UK, Switzerland, Italy, and Japan. Specifically, these assignments were:
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> - Development of three franchise strategies for a major European pharmaceutical company;
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> - Development of a portfolio management system for a Japanese pharmaceutical company;
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> - Development of a portfolio management system for a US pharmaceutical company;
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> - Development of a portfolio management system for an EU pharmaceutical company;
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> - Building a sales force strategy for an EU pharmaceutical company.

In August 2002, upon completion of the above set of portfolio and strategy assignments, Mr. Faber requested that he not be transferred to the UK and that he be given, instead, a permanent position at SDG in the US, to help expand SDG's Life Sciences Consulting Practice on the East Coast. This was granted, provided that Mr. Faber obtained the appropriate immigration status.

10. Petitioner later submitted to the Division his own letter dated January 21, 2004 which reiterated the information detailed in the August 20, 2003 letter of Ms. Mandel.

11. Following a review of the information provided by petitioner, the Division concluded that petitioner's stay in New York was not "temporary" within the meaning of the relevant statutes and regulations. The Division thus found that petitioner's residence in New York during the years at issue constituted a permanent place of abode. Accordingly, the Division determined that petitioner was properly subject to tax as a resident of the City and State of New York.

12. On the basis of the forgoing conclusions, the Division issued three notices of deficiency to petitioner dated November 24, 2003 which asserted deficiencies of New York State and New York City personal income tax, plus interest, for the years 2000, 2001, and 2002 as follows:

Year	2000	2001	2002
Tax Due	$7,617.35	$11,681.42	$6,676.39

13. Petitioner's nonresident returns and records of the Division indicate that petitioner earned wages from 1995 through 1999 as follows:

Year	1995	1996	1997	1998	1999
Wages	$2,000.00	$44,430.70	$49,075.44	$78,506.48	$68,174.32

14. There is no evidence in the record regarding the identity of petitioner's employer or employers from 1995 until he commenced employment with SDG in 1999.

15. There is no evidence in the record as to petitioner's visa status before August 9, 1999 (***see***, Finding of Fact "5 ").

16. Petitioner offered no testimony at hearing and submitted no affidavits.

17. The parties agree that petitioner was not domiciled in New York during the years at issue. The parties further agree that petitioner was present in New York State and City for more than 183 days during each of the years at issue.

CONCLUSIONS OF LAW

A. The issue in this proceeding is whether petitioner is subject to tax as a resident of New York State and New York City. The classification is significant because nonresidents are taxed only on their New York State and New York City source income whereas residents are taxed on their income from all sources (Tax Law §§ 611, 631). To the extent pertinent to this matter, Tax Law § 605(b)(1)(B) defines a resident individual as one:[1]

> who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

B. Here, the parties agree that petitioner was not domiciled in New York during the years at issue. The parties further agree that petitioner was present in New York State and City for more than 183 days during each of the years at issue. Also there is no question that petitioner maintained a place of abode in New York City during the years at issue. Consequently, the only issue remaining is whether petitioner maintained a *permanent* place of abode in New York City.

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1 The definition of a New York City resident is identical to the New York State definition of a New York State resident except for substituting the word "City" for "State" (New York City Administrative Code § 11-1705[b][1][B]).

The term "permanent place of abode" is not defined in the Tax Law. However, it is discussed in the regulations. As to the question of permanency, the Commissioner's regulations provide that "a place of abode . . . is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose" (20 NYCRR 102[6][e]). Accordingly, if a place of abode is to be deemed not permanent, as petitioner contends, it must be maintained during a temporary stay *and* the stay must be for the accomplishment of a particular purpose.

C. Petitioner has failed to meet his burden of proof imposed under Tax Law § 689(e) to show that his stay in New York City was temporary and for the accomplishment of a particular purpose. Accordingly, the notices of deficiency must be sustained.

Changes in petitioner's employment strongly suggest that his stay in New York was indefinite and not for a particular purpose. Specifically, at the time petitioner commenced employment with SDG in 1999 he had already been living and working in New York City for more than three years.[2] Petitioner's at will employment status at SDG also suggests that his stay in New York was of an indefinite duration and was neither temporary nor for the accomplishment of a particular purpose. Additionally, the broad range of assignments given to petitioner as listed in Ms. Mandel's letter indicate that petitioner's job entailed general duties and that his New York employment was not for a particular purpose. Finally, petitioner's decision to remain in New York also supports a finding that his stay was not temporary.

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2 There are no details regarding petitioner's employment in New York from 1995 through the beginning of his employment with SDG. Based on the wages earned by petitioner, it appears that he was working full time as of 1996. Petitioner's representative claimed that he was pursuing an MBA, but there is no evidence in the record to support this contention.

D. The letters of Ms. Mandel and petitioner suggest that petitioner's employment in New York was intended to last about three years for training and the completion of certain assignments, after which petitioner would be transferred to London. The letters thus suggest that petitioner's stay in New York was temporary. The letters of Ms. Mandel and petitioner, however, do not address the fact that petitioner had been living and working in New York for about three years at the time he accepted employment with SDG in 1999. As noted previously, such prior employment supports a finding that petitioner's stay in New York was of indefinite duration. Furthermore, while the letters purport to show SDG's intent to limit petitioner's New York employment to a training period, of greater significance is whether petitioner intended to transfer to London upon completion of the training period. The only evidence in the record on this point is petitioner's claimed request to remain in New York at the completion of the training period and his continuing employment by SDG in New York for the years 2003 and 2004. Such continuing New York employment clearly does not support petitioner's position that his intent was to transfer to London and, accordingly, does not support his position that his stay in New York during the years at issue was temporary.

E. At hearing, petitioner's representative noted petitioner's high level of education and expertise in a highly specialized area in support of petitioner's position. While apparently necessary to qualify for an H-1B visa (***see***, 8 Code of Federal Regulations ["CFR"] 214.2[h][1][ii][B]), petitioner's education and undisputed expertise are insufficient to establish temporary status under the Division's regulations.

F. Petitioner's representative also noted that H-1B visa status is for workers "temporarily in the United States" (8 CFR 214.2[h][1][ii][B]). Petitioner's representative submitted information obtained from the United States Department of State website indicating that an H-1B

visa holder may remain in the United States for up to six years. At that point the alien must remain outside the United States for one year before another H-1B visa can be approved. An H-1B visa holder, like petitioner, may also apply for and be granted permanent resident status.

While these immigration rules and regulations may support petitioner's claim that his stay in New York was temporary, they clearly are not dispositive. In this case, the evidence in the record indicating that petitioner's stay was indefinite and not for the accomplishment of a particular purpose compels the conclusion that petitioner failed to meet his burden of proof. Moreover, even assuming that petitioner's stay was temporary, in order to establish that he was taxable as a nonresident, as noted previously, petitioner also had to show that his stay was for the accomplishment of a particular purpose. As discussed above, petitioner has failed to make such a showing.

G. The petition of Hylke Faber is denied and the notices of deficiency dated November 24, 2003 are sustained, together with such interest as may be lawfully due.

DATED: Troy, New York
November 23, 2005

/s/ Timothy J. Alston
PRESIDING OFFICER